United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original w/affidavit of mailing

75-2151

To be argued by
DAVID S. GOULD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-2151

JAMES KAYLOR,
Petitioner-Appellant,

against—

UNITED STATES OF AMERICA,
Respondent-Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Appellant appeals from an order of the United States District Court for the Eastern District of New York (Neaher, *J.*) entered November 26, 1975, after a hearing, denying appellant's September, 1974 application pursuant to 28 U.S.C. § 2255 to vacate his conviction on the grounds, *inter alia*, that his trial counsel had been incompetent and that there had been an impermissibly suggestive identification procedure employed at his trial.

Appellant and one co-defendant, Willie Glen Hopkins, were convicted on April 6, 1973, after a trial before Honorable George Rosling of the United States District Court, Eastern District of New York, and a jury on one count of violating 18 U.S.C., § 659 (armed hijacking). A judgment of acquittal was directed by the court with respect to a third defendant named Johnny Dawson. Appellant was sentenced to imprisonment for a period of ten

years. His conviction, as well as that of Hopkins, was affirmed on appeal, *United States* v. *Kaylor*, 491 F.2d 1127 (2d Cir. 1973).

On this appeal, appellant argues that at his trial, the in-court identification made of him by the driver of the hijacked tractor-trailer was tainted by a suggestive show-up procedure. Appellant has abandoned his argument concerning his trial counsel's competency.

Statement of the Case

A. Trial testimony

On the night of July 20, 1972, Carl Wolverton, an "over the road" tractor-trailer driver arrived in Jamaica, Queens, en route from Dakota City, Nebraska, with a trailer-load of beef (T 175-176).[1]

At about 11:00 P.M. that night, Wolverton left the tractor-trailer, which he had parked at a main intersection, to get a sandwich (T 180, T 304). When he returned, he opened the door of the cab of the tractor and got in (T 180-181). As he was about to lock the door, an individual, later identified by Wolverton as appellant's co-defendant, Willie Glen Hopkins, opened the door, pointed a gun at his head and told him to get into the "bunk" in the back of the cab (T 181-182, T 307). Wolverton then got in the "bunk" facing the windshield and about thirty seconds later a second individual, identified by Wolverton as appellant Kaylor, entered the cab and took the gun and pointed it at Wolverton as Hopkins

[1] All numbers proceeded by a "T" refer to the transcript for the trial. All numbers proceeded by a "H" refer to the transcript of the § 2255 hearing.

tied Wolverton up (T 183-184, T 309). Wolverton testified that during the one and a half to two minutes that it took Hopkins to tie Wolverton's hands and feet he was looking directly at Kaylor's face (T 309-310).

Sometime thereafter, after being driven around for a "couple of hours" by the hijackers, Wolverton was thrown out of the tractor-trailer into another vehicle, a blue Dodge van. In the van, the hijackers stripped Wolverton down to his underwear. The hijackers then beat, kicked and urinated upon him (195). At this time Wolverton was "near hysteria" and in "tremendously bad shape" (T 349, T 352). He was abandoned in the van and worked himself free sometime in the morning of July 21 (T 196). The tractor-trailer was gone .

At 7:00 A.M. on July 21, Detective John Flynn of the New York City Police Department saw Wolverton's tractor-trailer and followed it to its destination, a meat market owned by Charles Simonian and Nicholas Stalfi (T 231, T 234, T 428, T 453). There Flynn observed five men in butcher jackets directing the vehicle into the alley way (T 234-235). The vehicle then circled the block and returned to the entrance (T 235). At this point Flynn called for assistance and proceeded to the area of the vehicle (T 236). Detective Flynn then observed the two individuals from the tractor-trailer walking away (T 236). They then "broke and ran" (T 236).

At trial Flynn identified Hopkins as the helper he had observed in the truck. The other individual, the driver of the truck, has never been apprehended (T 232-233).

While the tractor-trailer was approaching the back entrance of the meat market and circling the block, Charles Simonian was standing in the back yard with an individual who had been introduced to him as "Shorty" (T 435). This individual was a black man, about five foot five

to five foot eight, stocky build, with short cropped hair, thirty to thirty-five years old, without a beard or mustache (T 438, T 458). The butchers had seen him on a few previous occasions when he had inquired if they desired to buy meat (T 130-431, T 455). On the morning of July 21, "Shorty" had telephoned Charles Simonian and told him that he had some meat for him. At about 7:00 A.M. Simonian met Shorty in a luncheonette a few doors away from the meat market, where they discussed a possible purchase of a trailerload of meat (T 429, T 431). They then proceeded to the meat market which Simonian opened. Stalfi also observed Shorty that morning (T 454, T 455).

Although both Simonian and Stalfi stated at trial that Shorty "looked liked" or "resembled" the appellant, they stated that appellant Kaylor was not Shorty (T 439, T 460-461). The only difference between the description of Shorty and that of Kaylor was that Kaylor had a beard, more hair and puffier checks and was somewhat fatter (T 439, T 458, T 461, 462). Nevertheless, both Simonian and Stalfi had identified a picture of James Kaylor as the man they knew as "Shorty" before the grand jury when they were shown a spread of photographs (T 445, T 467). The picture of Kaylor, like the description of Shorty, was of a man without a moustache or beard (T 447). At the trial, appellant sported a beard.

Henry Stanich, a New York City police officer, testified at trial that in the course of his duties, he had occasion on December 14, 1972, to ask James Kaylor if his name was "Shorty". Kaylor replied that "Shorty" was his alias or nickname (T 609, T 610, T 618-619).

On December 15, 1972, Allen Garber, Special Agent of the Federal Bureau of Investigation interviewed James Kaylor (T 577). After Garber told Kaylor that he had been indicted and gave him his "Miranda" warnings, Kaylor stated that "If I get uptight enough about this case

I can tell you about it" (T 579). After Agent Garber asked Kaylor questions relating to background information and description data, Kaylor stated, "I know about those two guys in the meat market and they shouldn't have paid the cops $500" (T 580-581).

At trial, the driver of the hijacked truck, Carl Wolverton, identified the appellant and his co-defendant as the individuals who hijacked his truck. This in-court identification of appellant was not made during Wolverton's initial testimony. Although Wolverton described the hijackers, he was not requested by either the government or defense counsel to make an in-court identification. When, however, Wolverton left the stand and went directly back to the witness room, he told Agent Garber that he could identify the two hijackers (T 287). When informed of this, the Assistant United States Attorney requested that Wolverton be recalled as a witness (T 206). At that point Judge Rosling, outside the presence of the jury (T 208-209), held an identification hearing. The Judge found that the witness was "forthright" (T 216) and no suggestiveness or impropriety had occurred (T 214, T 216, T 298-300).

At the hearing, Wolverton stated that Hopkins was a participant in the hijacking "without a doubt" (T 216). Wolverton then requested that Kaylor remove his jacket and roll up his sleeves and say "Nobody's going to hurt you, buddy." After this was done, Wolverton identified appellant as the second man in the hijacking (T 221).

B. The Appeal of the Trial Verdict

On appeal, appellant's counsel raised four issues, one of which is related to the appellant's claim in this case.[2]

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[2] He argued on appeal that the trial judge's questioning of Wolverton about the facts of the identification hearing deprived appellant of a fair trial. (Docket No. 73-1530, pp. 18-19).

Hopkins, appellant's co-defendant, argued that the in-court identification of him was tainted by the fact that it occurred after Wolverton had been recalled for that purpose and after Wolverton had an opportunity to see him at the counsel table. *United States* v. *Kaylor*, *supra*, 491 F.2d at, 1129 (2d Cir. 1973).

Rejecting the claims raised by appellant, this court affirmed appellant's conviction finding specifically that the trial judge had not overstepped his duty in clarifying ambiguous testimony and answers, *Id.* at 1130. Further, the Court held that while the identification of Hopkins amounted to a "showup", it was not *per se* inadmissible and did not violate due process when viewed in the totality of the circumstances. *Id.* at 1131.

C. Collateral Proceedings

By petition dated September 4, 1974, appellant moved pursuant to 28 U.S.C. § 2255, to vacate his sentence and judgment of conviction. Appellant argued that he was denied effective assistance of counsel and that the identification procedures utilized during his trial were violative of due process.

The District Court (Neaher, *J.*) denied appellant's motion to vacate his sentence. The Court found that while the petitioner himself had not raised the identification issue, the Court of Appeals had clearly decided the issue as to both defendants. (See Appellant's Appendix B, p. 11).

ARGUMENT

POINT I

Appellant is precluded from raising the issue of the in-court identification on this appeal.

In the § 2255 hearing, Judge Neaher refused to allow appellant to relitigate the issue of the in-court identification of appellant by Wolverton, the driver of the hijacked truck. The government asserts this decision was correct for either of the three following reasons: 1) The issue was decided on direct appeal by this court; 2) The appellant bypassed the orderly federal process by not specifically raising the identification issue on his appeal and 3) The District Court (Rosling, *J.*) decided the same issue raised herein after a hearing at the trial of appellant and his two co-defendants.

A. The Issue Was Raised On Direct Appeal

It has long been established that an evidentiary hearing is not required:

> "On constitutional claims where . . . a[n] appellate court had determined the same claim adversely to the applicant on the merits and reaching the merits on the post-conviction application would not serve the ends of justice." *Ormento* v. *United States*, 328 F. Supp. 246, 252 (S.D.N.Y. 1971).

In this appeal, appellant places great emphasis on the alleged judicial interference surrounding Wolverton's in-court identification of appellant. *See, e.g.* Appellants Brief, p. 13-14. That exact point was raised by appellant at trial (see Appellant's Brief in *United States* v. *Kaylor and Hopkins*, Docket #73-1530, pp. 18-19) and decided adversely to him. *United States* v. *Kaylor, supra*, 491 F.2d at 1130.

The issue of the in-court identification itself was not specifically raised by appellant, but it was raised by his co-defendant Hopkins who was also the object of the challenged identification. *See Kapatos* v. *United States*, 432 F.2d 110, 113 (2d Cir. 1970). Even though appellant did not specifically raise the issue, Judge Neaher pointed out that this court clearly included the appellant within the scope of its decision (Appellant's Appendix B, p. 11). In fact, this court always talked in the plural when discussing the issue:

> Appellant Hopkins complains that the court permitted the trucker, Wolverton, to return to the stand and make an identification which he had not made in the first instance; the objection is based upon the suggestiveness of the situation since—had the defendant known there was going to be identification testimony—he would have moved (and the court stated it would have granted such a motion) to have the defendant seated away from counsel table. As it was, the identification of Hopkins amounted to a "show-up", but a "show-up" is not per se inadmissible or violative of due process, depending rather upon the totality of the circumstances (Citations omitted). It is quite apparent that the omission to adduce identification testimony from the witness on his first trip to the stand was a lack of preparation on the part of the prosecution ("we felt he could [not] identify them in court"), rather then to any bad faith, or an attempt to produce a show-up. (Citation omitted). Here the witness, after he left the stand, volunteered to Detective Flynn that he had recognized the *appellants* as the hijackers. The court quite properly conducted a hearing in the jury's absence to determine whether there were taint by virtue of the viewing of the *defendants* for the first time in the courtroom, and satisfied itself that the witness was "forthright"

> and his testimony positive. He had had, he had previously testified, a minute and a half to see the *hijackers*, at the time of the robbery, and his description of the *appellants* was accurate. The prosecution could have been forewarned, since the witness himself apparently thought he could make an identification, but its omission to ask the key questions, we believe as did the court below, was inadvertent. (Emphasis added) *United States* v. *Kaylor*, *supra*, 491 F.2d at 1131-1132.

Since the "judicial interference" issue was specifically raised by appellant on appeal and the identification issue was fully treated by the appellate court as it related to appellant, appellant should be precluded from raising the issue again on this appeal.

B. Appellant By-Passed The Orderly Federal Process By Not Specifically Raising the Identification Issue On Appeal

It is clear that a violation of *significant* constitutional dimensions may be raised for the first time in a collateral proceeding. *United States ex rel. Di Giangiemo* v. *Regan*, — F.2d — (decided December 29, 1975; Slip Op. 1281; *See also United States* v. *West*, 494 F.2d 1314, 1315 (2d Cir.), *cert. denied*, 419 U.S. 899 (1974)). (Failure to raise issue at trial precluded later collateral challenge to the ruling even though the alleged error was of a constitutional nature). However, even a significant constitutional issue may not be raised in a collateral proceeding if the appellant's failure to raise the issue on appeal amounted to a knowing bypassing of orderly federal process. *Kaufman* v. *United States*, 394 U.S. 217, 227 n. 8. *See also Clausell* v. *Turner*, 295 F. Supp. 533, 537 (S.D.N.Y. 1969); *Wapnick* v. *United States*, 311 F. Supp. 183 (E.D.N.Y. 1969), *aff'd*, 423 F.2d 1361 (2d Cir.), *cert.*

denied, 400 U.S. 845 (1970); *cf. Torres* v. *United States*, 469 F.2d 651 (9th Cir. 1972). A collateral attack can not be used in lieu of appeal. *Castellana* v. *United States*, 378 F.2d 231 (2d Cir. 1967).

Clearly, if appellant was aware of the identification issue on appeal but failed to raise it, he bypassed the orderly federally process and cannot raise the issue on a collateral attack. *See, United States* v. *West, supra*, 494 F.2d at 1315. In *Williams* v. *United States*, 463 F.2d 1183 (2d Cir. 1971), *cert. denied*, 409 U.S. 967 (1972) this Court pointed out that the issue that appellant attempted to raise in a collateral attack had been highlighted at trial. The court concluded that the appellant was precluded from raising the same issue in a § 2255 attack since appellant's action amounted to a deliberate bypassing of orderly federal procedure "at or before trial and by appeal. Hence it is within the exception set forth in *Kaufman* . . ." Id. at 1184.

It would be difficult to imagine a more deliberate bypassing of orderly federal procedure then occurred in the case at bar. Appellant's counsel was skilled and experienced.[3] The identification issue was greatly contested at trial and on appeal so it could not be said that appellant inadvertently overlooked the issue on appeal. An appellant should not be able to sit back and let a co-appellant raise an issue and then obtain a de novo review of the issue if he is not satisfied with the result achieved by the co-appellant.[4]

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[3] In his written decision, Judge Neaher emphasized that appellant's counsel was ". . . experienced in handling criminal cases, having been an Assistant United States Attorney for seven years and defense counsel for five years at the time of trial . . ." Appellant's Appendix B, p. 9.

[4] Had this court reversed on the identification issue on appeal, it is doubtful that appellant would now be arguing that the appellate decision did not embrace him.

C. Appellant Should Be Precluded From Raising The Identification Issue Because The Trial Court Determined The Issue After A Full Hearing

One of Judge Neaher's reasons for declining to reopen the identification issue was that the trial court (Judge Rosling) decided the very same issue adversely to appellant after a full hearing. Appellant's Appendix B, p. 11. The United States Supreme Court in *United States* v. *Kaufman*, *supra*, 394 U.S. at 227 n. 8 stated:

> "where a trial . . . court has determined the federal prisoner's claim, discretion may in a proper case be exercised against the grant of a § 2255 hearing . . . "; See also *Dalli* v. *United States*, 491 F.2d 758 (2d Cir. 1974); *Ormento* v. *United States*, *supra*, 328 F. Supp. at 252.

Since Judge Rosling held a full hearing on the very issue raised in this case and made factual determinations related thereto (See *United States* v. *Kaylor*, *supra*, 491 F.2d at 1132), Judge Neaher acted well within his discretionary powers in refusing to determine the identification issue *de novo*.

POINT II

The in-court identification of appellant by Wolverton was not constitutionally infirm.

Even assuming appellant is not precluded from raising the identification issue on this appeal, he should not prevail since the in-court identification was not constitutionally impermissible.

Wolverton's in-court identification of appellant did constitute a show-up, but the identification was well tested by extensive cross-examination at trial. (See T. 303-367;

see also *Simmons* v. *United States*, 390 U.S. 377, 384 (1968); *United States ex rel. Gonzalez* v. *Vincent*, 477 F.2d 797 (2d Cir. 1973), *cert. denied*, 414 U.S. 924 (1974).

Appellant states in his brief that the manner in which Hopkins and appellant were identified:

> ". . . made it inevitable that Wolverton would identify appellant as the second man involved in the hijacking whether or not appellant had in fact participated . . ." Appellant's Brief, p. 12.

If the 'show-up' made the identification "inevitable", then why did Wolverton require appellant to roll up his sleeves and say some words before he could identify him positively as one of the hijackers?

In any event, this court determined the issue as it related to the in-court identification of Hopkins and appellant in *United States* v. *Kaylor*, *supra*, 491 F.2d at 1131-1132. It is, we submit, the law of the case and there is no compelling reason to abandon that determination. See *United States* v. *Fernandez*, 506 F.2d 1200 (2d Cir. 1974).

Appellant asserts that the show-up was more harmful to appellant than Hopkins because the evidence against appellant was weak. Appellant's Brief p. 20. Initially, it should be pointed out that when *Stovall* v. *Denno*, 388 U.S. 293, 303 (1967), stated that the identification issue should be determined based on the "totality of circumstances surrounding it", the "it", referred to the confrontation not to the entire trial itself. If there was less evidence against appellant than against Hopkins, that would be important only in determining if the error was harmless not in determining whether there was in fact any error.

In any event, the evidence against appellant was not weak, as appellant claims. Unlike Hopkins, appellant

made an incriminating post arrest statement to an FBI Agent.[5] The butcher Simonian picked appellant's picture out of a book of 150 pictures on the day of the event and later picked appellant's picture out of a nine-photo spread (T. 1131). In addition, appellant admitted to having the nickname "Shorty"—the same name used by the hijacker the butchers dealt with (T. 1129).

Appellant also asserts that the identification issue was particularly crucial to appellant since at the § 2255 hearing, Hopkins admitted committing the hijacking, but testified the person he committed the hijacking with only looked like appellant. Appellant's Brief, p. 14 n. 2. Appellant assumes that Hopkins' testimony was credible. In fact, his testimony was most incredible. Judge Neaher summarized Hopkins' incredible testimony about the fantasmagorical appellant look-alike:

> "He admitted his own participation, aided not by his uncle but by two men, one of whom clearly resembled his uncle and who was also nicknamed "Shorty." He had met these two men, whose names he did not remember, at a bar the night of the hipacking and they decided then and there to hijack the truck. He had never seen them before that night. Either during or after the trial, he did not tell anyone, except possibly his aunt, that his uncle had not participated in the hijacking." Appellant's Appendix B, p. 5.

In addition Hopkins testified that the "real" hijacker did not have the same voice as his uncle (H 40) even though Wolverton identified appellant as one of the hijackers partially through a voice identification.

In sum, then, even if this court were to reach the merits of the issue raised by appellant, it is clear he would not be entitled to the relief sought.

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[5] He stated, "If I get up tight enough about this case, I can tell you about it." (T. 1130).

CONCLUSION

The denial of the Section 2255 petition should be affirmed.

Dated: Brooklyn, New York
February 16, 1976

Respectfully submitted,

DAVID G. TRAGER,
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* The United States Attorney's Office wishes to acknowledge the invaluable assistance of William Kirschner in the preparation of this brief. Mr. Kirschner is a third year law student at Fordham University Law School.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
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LYDIA FERNANDEZ, being duly sworn, says that on the 19th day of February, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a Brief for the Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Jonathan Silbermann, Esq.
The Legal Aid Society
Federal Defender Services Unit
509 U. S. Courthouse
~~Foley Square, New York, N. Y.~~ 10007

Sworn to before me this
19th day of February, 1976

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977

Lydia Fernandez

LYDIA FERNANDEZ